No. 86 1501

Supreme Court, U.S.
FILED
MAR 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

THE CITY OF McKEESPORT and
WILLIAM WEISSERT,

Petitioners,

vs.

REBECCA L. CUNNINGHAM, an individual,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID H. TRUSHEL, ESQUIRE*
DEBORAH D. OLSZEWSKI, ESQUIRE
TRUSHEL, KLYM & ASTI
Attorneys for Petitioners
1207 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 232-3800

* *Counsel of Record*

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

Question Presented for Review

I. Whether the decision of the United States Court of Appeals for the Third Circuit misapplied and misinterpreted the holding of this Court in *City of Riverside, et al. v. Rivera, et al.*, _____ U.S. _____, 106 S.Ct. 2686 (1986)?

List of Parties

PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT DISMISSED PRIOR TO TRIAL

Samuel R. Vedrovic

Gerald F. Boyle

Joseph P. Graziano

James Weatherington

Charles A. Sharbaugh

Nicholas J. Skezas

Carolyn O. Young

PARTIES TO THE PROCEEDING IN THE DISTRICT COURT NOT PARTIES TO THE APPEAL

Robert Clyde Omslaer, d/b/a Omslaer Wrecking Company

TABLE OF CONTENTS.

	Page
Question Presented for Review	i
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statutes Involved	2
Statement of the Case	3
Reason for Granting the Writ	5
I. The decision of the Court below is a misinterpretation and misapplication of this Court's decision in *Riverside*, and not in conformance with this Court's Order of July 7, 1986	5
Conclusion	12
Appendix:	
Order of the Supreme Court of the United States, dated July 7, 1986	1a
Opinion of the United States Court of Appeals for the Third Circuit, No. 84-3209, dated December 12, 1986	2a
Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984	4a

Page

TABLE OF AUTHORITIES.

CASES.

City of Riverside v. Rivera, _____ U.S. _____, 106 S.Ct. 2686 (1986) ..... *passim*
Hensley v. Eckerhart, 461 U.S. 424, 105 S.Ct. 1933, 76 L.Ed. 2d 40 (1983) 7,10,11
Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (C.A.5, 1974) 7

STATUTES.

Civil Rights Act of 1871, 42 U.S.C. Section 1983 ... 3
Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Section 1988 2,5
28 U.S.C. Section 1254(1) 2

IN THE

Supreme Court of the United States

October Term, 1986

No._____

THE CITY OF McKEESPORT and
WILLIAM WEISSERT,

Petitioners,

vs.

REBECCA L. CUNNINGHAM, an individual,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The Order of this Court is not reported but appears in the Appendix at 1a.

The Opinion of the United States Court of Appeals for the Third Circuit is not reported but appears in the Appendix at 2a-3a.

The Opinion of the United States District Court for the Western District is not reported but appears in the Appendix at 4a-9a.

Statement of Jurisdiction

This Court's Order granting Petitioner's Petition for Writ of Certiorari and remanding the case for consideration in light of the decision in *City of Riverside v. Rivera*, _____ U.S. _____, 106 S.Ct. 2686 (1986) was entered on July 7, 1986.

The decision of the Court of Appeals was issued on December 12, 1986. This Petition for Writ of Certiorari has been filed within ninety (90) days of that date. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Constitutional Provisions Involved

None.

Statutes Involved

The Civil Rights Attorney's Fees Award Act of 1976 provides as follows:

> "... The Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. Section 1988.

Statement of the Case

This is a civil action for damages brought pursuant to the Civil Rights Act of 1871, 42 U.S.C., Section 1983 by an individual against the City of McKeesport and other defendants.

Respondent claimed damages as the result of the March, 1981 demolition of an uninhabited and previously condemned house and garage owned by her. She paid $2,700.00 for the property and had invested approximately $2,000.00 in its renovation at the time of its demolition. She proposed to invest another $15,000.00 in the property, by way of a federal IMPAC loan, in order to make the house habitable.

Respondent claimed her civil rights had been violated as a result of the demolition. Petitioners never contested that the house and garage had been demolished by the City of McKeesport, rather, they contested whether or not such actions amounted to a violation of plaintiff's civil rights and also contested the amount of damages claimed by Respondent.

Respondent's initial demand to settle the case was $57,800.00. She based this demand on her estimate of the post-renovation fair market value of the house and garage as being $40,000.00. She also included the "loss of use" of the $15,000.00 IMPAC loan, even though she had never received the funds, nor was ever obligated to repay them. She also claimed damages of $250.00 per month for apartment rental for herself and the lost income of $50.00 per month for garage rental which she allegedly would have secured after renovation.

Prior to trial, Petitioners offered $15,000.00 to settle the case, which was refused. The District Court ruled, also prior to trial, that the $40,000.00 estimate of the post-renovation fair market value of the property was not a proper item of damage. Respondent refused to accept the $15,000.00 up to and through trial and was ultimately awarded $17,000.00. Neither Respondent nor Petitioners filed an Appeal from this Award. Respondent subsequently filed for attorney's fees in the amount of $33,887.50.

Petitioners contested Respondent's right to attorney's fees based on the Federal Court decisions regarding denial of attorney's fee Awards in cases similar to Respondent's. In the alternative, Petitioners challenged the amount of fees requested based on the Federal Court decisions regarding the relation between the nature and amount of benefit conferred on the plaintiff and the amount of fees requested.

The District Court Judge, who handled the entire matter from the filing of the suit, through discovery and trial, awarded $5,875.00 in attorney's fees, plus costs, in March of 1984. Respondent appealed the Opinion of the District Court Judge, which was reversed, and the Third Circuit ordered the District Court to award attorney's fees in the amount of $33,887.50 and reimbursement of costs in the amount of $781.05.

Respondent's attorneys have already petitioned the District Court for an additional $11,968.70 for time and costs expended on their Appeal and in litigating the Fee Petition.

REASON FOR GRANTING THE WRIT

I. The decision of the Court below obviously conflicts with the decision of this Court in *City of Riverside v. Rivera*, _____ U.S. _____, 106 S.Ct. 2686 (1986). That decision was whether or not the fee Award rendered by the District Court was "per se unreasonable" since it exceeded the amount of damages recovered by the plaintiff. By reinstating their prior Order, the Third Circuit has made this Court's action in granting the previously filed Writ for Certiorari a nullity. The Circuit has flaunted this Court's Order of July 7, 1986.

Once again, the case before this Court is an example of the judicial process run amok and the nightmare of litigation which continually erodes and undermines the legitimacy of and confidence in the American legal system as a whole.

42 U.S.C. Section 1988, *et seq.*, makes it clear that an award of attorney's fees is meant to be compensatory rather than punitive. The decision of the Court below is so clearly designed to be punitive in nature, as to virtually preclude the future defense of cases such as the one at hand. The intent of the Court below to punish Petitioner for defending this case is becoming painfully obvious with each decision. They have pointedly ignored this Court's instructions in granting the previously filed Writ for Certiorari and returning the case for reconsideration.

Briefly, Petitioners mistakenly demolished two structures owned by Respondent. She sustained approximately $4,700.00 of actual damages. Yet, with the assistance of legal counsel, she demanded a

settlement in excess of $57,000.00 up to and through trial, based upon items of damages which were obviously improper and largely unsubstantiated.

Petitioners *never* contested their liability for the demolition. The only hotly contested issues, pressed unrelentingly, by the Respondent, were that (1) the actions of Petitioners amounted to a civil rights violation; and (2) she was entitled to show a jury unsubstantiated damages which were more than ten times the amount she actually sustained.

The entire lawsuit was never handled with an eye towards restoring to plaintiff that which she had lost; rather, it was prosecuted solely to avail Respondent and her counsel of the protective cloak of the Civil Rights Act and the recovery of a windfall, both for Respondent in the amount of damages claimed and her attorneys, in run-a-way legal fees.

Petitioner's refusal to submit to the demand, which was ultimately vindicated by an award to Respondent almost identical to the offer, has cost them the penalty of paying the attorney's fees generated by Respondent's unreasonable and unrealistic prosecution of her claim. These attorney's fees now approach *$50,000.*

The punitive effect of the Third Circuit's decision absolutely precludes the defense of cases such as this where the plaintiff can prove a civil rights violation in only the most technical sense. Once a plaintiff has crossed this hurdle, the demand can be totally unrelated to the damages, he or she can unreasonably refuse to compromise, and blithely proceeding to trial without any consideration of the legal costs or time involved. The decision of the lower Court condones and implicitly encourages the unreasonable and unrealistic prosecution

of suits by rewarding Respondent for this type of activity and penalizing Petitioners for their unwillingness to submit to such demands.

The exorbitant amount of legal time incurred in this case was *entirely* due to Respondent's insistence that she was entitled to recover more than ten times the amount of damages she sustained.

The Trial Judge in the Western District was aware of this and had first-hand knowledge of the posture assumed by the plaintiff throughout the litigation, and reduced the Fee Petition accordingly.

The issue decided by this Court in *City of Riverside, supra,* and the case at hand are identical. The central issue being whether or not the Appellate Court could disturb the judgment of the District Court.

This Court discussed in *Riverside, supra,* p. 2691, the application of *Hensley v. Eckerhart,* 461 U.S. 424, 105 S.Ct. 1933 (1983), in determining what is a reasonable fee Award. This Court also discussed the application of *Johnson v. Georgia Highway Express, Inc.,* 488 F. 2d 714 (C.A. 5, 1974), which set out 12 factors to consider in calculating a reasonable attorney's fee. *Id.*

After a thorough cogitation of all of these factors, this Court found that the District Court had not abused its discretion and that the Award of fees at the District level was not unreasonable. Accordingly, the Court rejected Appellant's argument that the fee Award should be proportional to the amount of damages recovered.

Petitioners here argue that the impact of the *Riverside* case dictates that the Award of the District Court be affirmed. Appellant in *Riverside* argued that the Court of Appeals' affirmance of the District Court Award of fees

was improper because it found the District Court's Award to be reasonable. This Court rejected that argument, even though the award on its face, appeared unreasonable to at least one member of the Court. In the instant case, the United States Court of Appeals for the Third Circuit found the District Court Award to be *unreasonable* and substituted its judgment for that of the District Court even though there was *no* finding that the award was unreasonable. *City of Riverside* clearly mandates that the judgment of the Third Circuit be vacated and the District Court's judgment be affirmed.

Respondents in the instant case argued that it was unreasonable for the District Court to reduce the amount of fees requested. The District Court made such a reduction by considering the factors mandated by the *Riverside* decision. The District Court considered:

(1) The time and labor required, and found that given the straightforward theory of liability and measure of damages as well as the concession of liability on the part of the defendants, that the amount of time spent was excessive and duplicative;

(2) The novelty and difficulty of the questions, finding that there were no novel or complex legal or factual issues;

(3) The skill requisite to perform the legal service properly decided that the relative inexperience of Respondent's counsel was reflected in the number of hours devoted to a relatively simple action;

(4) Whether the fee was fixed or contingent, finding that from the outset Respondent had a good prospect for recovery and that a contingency adjustment was warranted;

(5) The experience, reputation, and ability of the attorneys, finding that the relative inexperience of Respondent's counsel in handling the matter warranted a reduction of the hourly rate to $50.00 per hour; and

(6) The undesirability of the case, finding that Respondent had a good prospect for recovery, as well as finding that the instant case advanced no new theories of law which would serve the public interest nor showed any indication of bad faith in the defense of the action and that the Respondent sustained an isolated act for which she was adequately compensated.

Petitioners believe that the impact of the *Riverside* case precludes the Third Circuit Court of Appeals from finding that the District Court Award was unreasonable and, in fact, mandates that the District Court's Award be undisturbed.

The concurring Opinion of Justice Powell in *Riverside* states that although on its face the Award of the District Court in that case appeared unreasonable, there was no reason to disturb the Findings of Fact or Conclusions made by the District Court. In the instant case, although the standard of review for the Court of Appeals was whether or not there was an abuse of discretion in the Award of the District Court and whether or not that Award was unreasonable, there is *no* such finding that the Award of the District Court was unreasonable. On the contrary, the Third Circuit found only that the District Court had erred.

It may be debated that the holding in *Riverside* is that there is to be no consideration of the proportionality between the amount of fees awarded and the amount of damages. However, the language in the Opinion with respect to that rule is used to support this Court's

decision that the decision of the District Court in *Riverside* was reasonable. If this Court intended that the rule of proportionality be the holding of the case, there was no reason to grant these Petitioner's the Writ of Certiorari since *denial* of the Petition would have been consistent with the Proportionality Rule. Petitioner respectfully believes that this Court granted the Writ since the holding of *Riverside* is that the Appellate Courts may *not* find the District Court's judgment unreasonable where there have been Findings of Fact made in that forum with respect to the fee Award.

This is quite clear in light of this Court's reliance upon *Hensley, supra,* in its Opinion in *Riverside.* The reasoning of the *Hensley* decision is that discretion in determining a fee Award is appropriately vested in the District Court in view of its superior understanding of the litigation and the desirability of avoiding frequent appellate review of what are essentially factual matters.

The Third Circuit held that the District Court had no basis for reducing the billing rate or disallowing those hours which the Court had no personal knowledge, stating that the claimed hours and billing were uncontradicted in the record and Petitioners had not challenged their reasonableness. It is unclear to Petitioners what can be more of a challenge to the reasonableness of a fee petition than the argument that Respondent's counsel is entitled to *no* attorneys' fees.

The Circuit considered it inappropriate for a District Court in an adversarial system to reject uncontradicted sworn Affidavits because of reasons not raised by opposing counsel and on the basis of facts which the Trial Court has no personal knowledge. They ignored the Petitioners' Response to the Fee Petition and the indisputable fact that the District Court Judge handled

the litigation from beginning to end and, in fact, had intimate first hand knowledge of the conduct and ability of Respondent's counsel.

The Circuit also recognized the unifying theme of this Court's plurality opinion in *City of Riverside;* that being the plurality satisfaction that the findings of the District Court were sufficiently detailed to justify the fee Award.

At the very least, if the Circuit looked with disfavor on the methods of the District Court in awarding fees to Respondent's attorneys, it should have ordered that Court to rehear the Petition, rather than arbitrarily imposing its own judgment. In failing to do so, it destroyed the carefully crafted parameters of the District Court's discretionary powers as set forth in *Hensley, supra,* and substitutes Appellate review by fiat.

The quandary in which Petitioners found themselves when they last approached this Court for relief has, incredibly, become more bizarre. This situation further fuels public criticism of its legal system as unresponsive, unwieldy, and unjust. The bizarre result of facing what has now escalated to over $45,000.00 of attorney's fees on a simple tort claim with property damage of only $4,700.00, exemplifies all of the worst that can be said about the judicial system and the practitioners who move within it. This situation exemplifies the "liability crisis" in which our municipalities now find themselves.

It is for these reasons that the Court with the most intimate knowledge of the litigation *must* be permitted to exercise its discretion with respect to these matters. A little knowledge is a dangerous thing and, indeed, the little knowledge brought to the Circuit Court in this case, has wrought the ultimate danger—an absolutely ludicrous and irrational result.

The decision directly conflicts with the law that this Honorable Court approved in its decision in *Riverside.*

Conclusion

For these reasons, a Writ of Certiorari should issue to review the decision of the Court of Appeals for the Third Circuit in light of this Honorable Court's Opinion in *Riverside* and upon review that judgment should be reversed.

Respectfully submitted,

DAVID H. TRUSHEL, ESQUIRE*
DEBORAH D. OLSZEWSKI, ESQUIRE
TRUSHEL, KLYM & ASTI
Attorneys for Petitioners
1207 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 232-3800

* *Counsel of Record*

APPENDIX

Order of the Supreme Court of the United States dated July 7, 1986

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JUL 10 1986 12211d

July 7, 1986

Mr. David H. Trushel
1207 Fifth Avenue
Pittsburgh, PA 15219

Re: City of McKeesport, et al.
v. Rebecca L. Cunningham
No. 84-1795

Dear Mr. Trushel:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of City of Riverside v. Rivera, 477 U.S. _____ (1986).

Very truly yours,

JOSEPH F. SPANIOL, JR.
Joseph F. Spaniol, Jr., Clerk

Opinion of the United States Court of Appeals for the Third Circuit, No. 84-3209, dated December 12, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3209

REBECCA L. CUNNINGHAM, an individual,
Appellant,

vs.

THE CITY OF MCKEESPORT, WILLIAM WEISSERT, SAMUEL R. VIDNOVIC, GERALD F. BOYLE, JOSEPH P. GRAZIANO, JAMES HEATHERINGTON, CHARLES A. SHARBAUGH, NICHOLAS J. SKEZAS, CAROLYN O. YOUNG and OMSLAER WRECKING CO., ROBERT CLYDE OMSLAER t/d/b/a OMSLAER WRECKING COMPANY

(D.C. Civil No. 81-1434)

On Appeal from the United States District Court
for the Western District of Pennsylvania

Present: GIBBONS and BECKER, *Circuit Judges* and KATZ,* *District Judge*

ON REMAND FROM THE SUPREME COURT

Present: GIBBONS and BECKER, *Circuit Judges* and KATZ,* *District Judge*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel October 25,

* Hon. Marvin Katz, U.S. District Judge for the Eastern District of PA, sitting by designation.

Appendix—Opinion of the United States Court of Appeals for the Third Circuit, No. 84-3209, dated December 12, 1986.

1984. By opinion and judgment filed January 15, 1985, this Court reversed the judgment of the said District Court and remanded for further proceedings. The Supreme Court by orders dated July 7, 1986, granted the appellee's petition for writ of certiorari and vacated the judgment of this Court and remanded for further consideration in light of *City of Riverside v. Rivera*, 477 U.S. _____, 106 S. Ct. 2686 (1986). *City of McKeesport v. Cunningham*, _____ U.S. _____, 106 S. Ct. 3324 (1986).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 19, 1984, be and the same is hereby reversed and the cause remanded for further proceedings consistent with the original panel decision reported at 753 F.2d 262 (3d. Cir. 1985).

Costs taxed against the appellees.

Attest:

SALLY MRVOS
Clerk

DEC 12 1986

Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984

In The

UNITED STATES DISTRICT COURT

For the Western District of Pennsylvania

Civil Action No. 81-1434

REBECCA L. CUNNINGHAM, an Individual,
Plaintiff,

v.

THE CITY OF McKEESPORT, WILLIAM WEISSERT, SAMUEL R. VIDNOVIC, GERALD F. BOYLE, JOSEPH P. GRAZIANO, JAMES HEATHERINGTON, CHARLES A. SHARBAUGH, NICHOLAS J. SKEZAS, CAROLYN O. YOUNG and ROBERT CLYDE OMSLAER t/d/b/a OMSLAER WRECKING COMPANY,
Defendants.

MEMORANDUM OPINION

This action arose from the demolition of a house and garage without affording the owner notice or an opportunity to be heard. On August 15, 1983 a judgment for the plaintiff for $17,000 was entered. On November 29, 1983 James R. Cooney, counsel for plaintiff, moved for $33,887.50 in fees and $781.05 in costs under 42 U.S.C. §1988.

Local Rule 33 requires motions for attorney's fees to be filed within ten days after the entry of judgment, unless otherwise required to be filed prior to the entry of

judgment. This rule was effective September 15, 1983. Because the effective date of this rule was after the entry of judgment in this case, the time limitations of the rule are not applicable to this case.

In determining a fee award the Court first determines the number of hours that should reasonably have been devoted to the case. In the present case plaintiff's theory of liability and measure of damages were straightforward and no affirmative defenses were timely raised. Taking into consideration the experience of counsel, as discussed below, nonetheless the 318.5 hours spent were excessive and duplicative. The hours claimed for certain tasks will be reduced as follows:

Appendix—Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984.

	Hours Claimed	*Hours Allowed*
Research	86.5	60.75
Draft complaint	12.5	6
Preparation of filing and service documents	3.25	1
Draft interrogatories and requests for production, which were not served	1.5	0
Review of discovery	1.25	0
Status conference	1.5	.5
Draft motion to compel	1.5	.5
Pretrial conference	3.75	1
Draft supplemental pretrial statement	3	1
Draft trial brief	9.5	4
Discussions with partners	9.5	0
Miscellaneous correspondence with witnesses	7	0
Trial	32	22
Discussion and research on appeal, which was not taken	4.5	0
Miscellaneous correspondence	7.5	0

Additionally, the 11.5 hours claimed for W. Thomas Laffey, Jr. will be disallowed as duplicative of Mr. Cooney's work. Thus the compensable hours are 318.5 minus 99.5 or 219.

Second, the Court determines a reasonable hourly rate. Plaintiff's counsel is a recent graduate of law school and recent member of the Bar. His relative inexperience is reflected in the number of hours devoted to this action. In *Ursic v. Bethlehem Mines*, 719 F.2d 670, 674 (3d Cir. 1983) the United States Court of Appeals for the Third Circuit took judicial notice that in the Western District of Pennsylvania a $100 hourly rate reflects a fee charged by able and experienced counsel. In the present case the reasonable hourly rate is $50. This amount encompasses some lawyering activities which would command a higher rate, such as trial time, and some which would command a lower rate, such as investigation and clerical tasks.

Multiplying the reasonable number of hours (219) times the reasonable hourly rate ($50) the lodestar is $10,950. The lodestar will not be adjusted for contingency or quality. There were no novel or complex legal or factual issues. At the outset plaintiff had a good prospect for recovery. Thus a contingency adjustment is not warranted. Plaintiff's counsel showed that degree of skill expected of lawyers of the caliber reflected in the reasonable hourly rate. Thus a quality adjustment is not warranted.

The *Lindy* amount as calculated above will be subject to a post-*Lindy* discretionary adjustment. *See, Ursic v. Bethlehem v. Mines*, 719 F.2d at 677. Plaintiff's counsel did not successfully advance new law which might serve

the public interest in the future. The decision affected only an individual plaintiff who was subject to an isolated act of deprivation for which she was adequately compensated. There was no indication of bad faith in the defense of the action. *See Swicker v. William Armstrong & Sons, Inc.*, 484 F.Supp. 762, 766 (E.D. Pa. 1980). In light of these considerations, a reduction of the *Lindy* amount by 50% to $5475 is fair and equitable in this case.

The hours spent for the prosecution of the fee petition exceeded those that should reasonably have been devoted to this task. The 15 hours claimed will be reduced to 8 hours and counsel awarded $400 for the prosecution of the fee petition.

Plaintiff's counsel will be awarded $5875 in fees and $781.05 in costs. Plaintiff had entered into a contingent fee agreement under which counsel was to receive one-third of the net amount of the award, after the payment of costs. The reasons supporting the post-*Lindy* downward adjustment indicate that this is not an appropriate case for a dual recovery. Accordingly plaintiff's obligations under the fee agreement are deemed satisfied in full by the statutory fee award. *See Sullivan v. Crown Paper Board Co., Inc.*, 719 F.2d 667 (3d Cir. 1983).

An appropriate order shall issue.

Dated: March 19, 1984.

HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
Chief United States District Judge

Appendix—Opinion of the United States District Court for the Western District, Civil Action No. 81-1434, dated March 19, 1984.

ORDER

AND NOW March 19, 1984 in accordance with the foregoing memorandum opinion, IT IS HEREBY ORDERED that plaintiff's counsel is awarded $5875 in fees and $781.05 in costs.

HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
Chief United States District Judge

cc: James R. Cooney, Esq.
Nernberg and Laffey
301 Smithfield Street
Pittsburgh, PA 15222

William Acker, Esq.
McCrady-Nicklas Building
Pittsburgh, PA 15219

Deborah D. Olszewski
Attorney at Law
1207 Fifth Avenue
Pittsburgh, PA 15219

Supreme Court, U.S.
FILED
APR 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1501

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE CITY OF MCKEESPORT and
WILLIAM WEISSERT,
Petitioners,

v.

REBECCA L. CUNNINGHAM, an individual,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Maurice A. Nernberg, Jr.
James R. Cooney
NERNBERG & LAFFEY
Attorneys for Respondent
301 Smithfield Street
Pittsburgh, PA 15222-2277
(412) 232-0334

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
Opinions Below	1
Counterstatement of the Case	1
Summary of Argument	6
Argument	7
I. Petitioners' failure to challenge the reasonableness of the hours expended or the hourly rate requested in the District Court constituted a waiver of these issues	7
II. Petitioners' remaining arguments are not supported by the record and are frivolous in view of their failure to make an offer of judgment prior to trial	9
Conclusion	13
Appendix:	
Opinion of the United States Court of Appeals for the Third Circuit, No. 84-3209, dated December 12, 1986	1a

TABLE OF AUTHORITIES

Cases: Page

Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) 7, 8

City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2nd Cir. 1974) 8

City of Riverside v. Rivera, ____ U.S. ____, 106 S.Ct. 2686, ____ L.Ed. ____ (1986) 6, 8

Marek v. Chesney, 473 U.S. ____, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) 11

Statutes:

Civil Rights Act of 1871, 42 U.S.C. §1983 ..... 1, 2, 11

Civil Rights Act of 1871, 42 U.S.C. §1988 ..... 3, 5, 7, 11

Court Rules:

Federal Rule of Civil Procedure 11 10

Federal Rule of Civil Procedure 68 ..... 3, 10, 11

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit dated December 12, 1986 is not appended to the Petition for Writ of Certiorari and accordingly is appended hereto at Appendix 1a-11a.

COUNTERSTATEMENT OF THE CASE

The Respondent, Rebecca L. Cunningham (CUNNINGHAM), commenced the within civil rights action pursuant to 42 U.S.C. §1983 against the Petitioners, the City of McKeesport (McKEESPORT) and its building inspector, William Weissert, in August of 1981. The relevant facts underlying the dispute between the parties may be summarized as follows:

A. Cunningham's Claim

In November of 1980, Rebecca L. Cunningham purchased a house located in the city of McKeesport, Pennsylvania. CUNNINGHAM made minor repairs to the property and applied for a subsidized loan, through the Improvement Program of Allegheny County (IMPAC), to renovate her house. Due to her low income, CUNNINGHAM was eligible for an interest-free, $15,000.00 loan, to be repaid in monthly payments for a period of 15 years. IMPAC certified CUNNINGHAM's house to be structurally sound and approved her contractor's proposal to completely renovate her house for the price of $15,000.00. Following the renovations, CUNNINGHAM would have had a house worth more than $40,000.00, for monthly payments of only $83.00 under the IMPAC program. IMPAC formally approved CUNNINGHAM's application in February of 1981.

In March of 1981, the City of McKeesport, acting pursuant to a local statute, totally demolished CUNNINGHAM's house. Neither CUNNINGHAM nor the prior owner of the property, the United States Department of Housing and Urban Development, were notified of the proposed demolition. The local statute, which permitted demolition of "dangerous properties," was constitutional on its face, requiring reasonable procedures for

the identification of property owners, notice and a hearing. However, discovery and trial later indicated that McKEESPORT consistently violated both its own statute as well as the constitutional rights of its citizens in the procedures employed for the demolition of so-called "dangerous buildings."

As the result of the demolition, CUNNINGHAM commenced the within civil rights action pursuant to 42 U.S.C. §1983, asserting that Petitioners had deprived her of her property without due process of law. CUNNINGHAM's Complaint sought damages for the loss of her house which would have had a post-renovation value in excess of $40,000.00. CUNNINGHAM also sought recovery for the loss of use of her house as a home, since she was forced to rent another property at the cost of $350.00 per month. Under the IMPAC program, CUNNINGHAM's total monthly payment for housing would have been only $83.00 per month. Due to her low income, CUNNINGHAM could not afford to purchase another house, making her ineligible for the IMPAC program. Thus, CUNNINGHAM also sought recovery for the loss of use of the $15,000.00 interest-free loan from IMPAC. In support of her damage claims, CUNNINGHAM filed a Pretrial Statement which attached the reports of three qualified real estate experts, all of which indicated that CUNNINGHAM's house would have had a post-renovation value in excess of $40,000.00. In addition, CUNNINGHAM attached the expert report of James L. Kenkel, Ph.D., Chairman of the Department of Economics of the University of Pittsburgh. Mr. Kenkel's report concluded that CUNNINGHAM had sustained an additional economic loss in the amount of $38,846.00 for the loss of use of her house as a home and the loss of the $15,000.00 interest-free loan.

B. McKeesport's Defense

Contrary to the Petitioners' statement that they "never contested their liability for the demolition" (Petition, p.6), a review of the record makes it clear that Petitioners hotly contested their liability from the inception of the case up and through the trial on the merits. Initially, Petitioners filed an Answer which denied

liability, asserted that the Complaint failed to state a cause of action, and alleged that the District Court lacked jurisdiction. Petitioners later filed an Amended Answer which asserted the defense of governmental immunity under state law.

The Pretrial Statement filed on behalf of Petitioners failed to challenge CUNNINGHAM's asserted measure of damages. Instead, Petitioners again denied liability for their actions and alleged that the District Court lacked jurisdiction. In fact, in their Proposed Jury Instructions appended thereto, Petitioners took the position that the demolition was justified as an exercise of their "police powers" and that CUNNINGHAM was entitled to no compensation whatsoever for the demolition of her property.

At trial, Petitioners continued to contest liability and called several witnesses in an attempt to show that the demolition of CUNNINGHAM's house was justified. In his closing to the jury, counsel for Petitioners argued that since the demolition was undertaken in "good faith", Petitioners should be relieved of any responsibility for their actions.

C. The "Settlement" Offer.

From the date of the filing of the action, or August 25, 1981, until the day before the date scheduled for trial, or April 11, 1983, Petitioners never made an offer to settle the case. Similarly, Petitioners failed to make an Offer of Judgment as permitted under Fed.R.Civ.P. 68. Instead, on April 11, 1983, the day before trial, Petitioners offered $15,000.00 to settle the case. Moreover, although most of the work on behalf of CUNNINGHAM had already been done, the $15,000.00 offer was conditioned on a waiver of the right to claim attorney's fees pursuant to 42 U.S.C. §1988. Since Petitioners' offer was less than half of CUNNINGHAM's actual damages, exclusive of damages for emotional distress and punitive damages, and made no provision for attorneys' fees, the offer was rejected.

D. The Trial.

Trial began the following day and lasted for four days, due in large part to Petitioners' continued refusal to concede liability.

The evidence which unfolded at trial indicated both a widespread abuse of the procedures employed by McKEESPORT for the demolition of property as well as a total disregard of CUNNINGHAM's due process rights. Thus, although McKEESPORT's ordinance which permitted it to demolish "dangerous properties" required the building inspector to notify the property owner of the city's intention to demolish, the building inspector admitted that he had not personally notified an owner since 1976. Although the ordinance required the building inspector to examine public records found in the Register of Deeds to determine the record owners of the property, the building inspector testified that he did not have time for such duties, but merely assumed that someone else in his office had verified ownership. In addition, although the ordinance in question permitted demolition of "dangerous" buildings only, McKEESPORT was unable to establish that CUNNINGHAM's house was in fact dangerous. The building inspector testified that he slated the house for demolition due to a fire which had occurred years earlier. Although the building inspector stated that no fire damage was visible from the outside of the building, he admitted that he had never seen the inside. Moreover, although a so-called "fact-finding hearing" conducted with respect to the property concluded that the building inspector should examine the inside of the house prior to authorizing demolition, he admitted that he neglected to do so since "he did not have time".

On the basis of the above evidence, counsel for CUNNINGHAM requested an instruction on punitive damages which was refused by the District Court. Moreover, although Petitioners never challenged CUNNINGHAM's asserted measure of compensatory damages until the time of trial, the District Court determined that CUNNINGHAM was not entitled to recover for the post-renovation value of her house. The District Court then submitted the case to the jury on special interrogatories, which permitted them to award damages for the pre-demolition value of the house, the loss of the $15,000.00 no-interest loan and emotional distress. The jury thereafter returned a verdict in favor of CUNNINGHAM in the amount of $35,000.00, allocating $20,000.00 for CUNNINGHAM's loss of

the house and $15,000.00 for loss of the no-interest loan. In addition, by virtue of Answers to Special Interrogatories, the jury specifically found that Petitioners had violated CUNNINGHAM's civil and constitutional rights.

Petitioners filed post-trial motions, and as a result of the same, the District Court entered an Order reducing the jury's verdict to $17,000,000. The aforesaid reduction was based upon the District Court's opinion that damages for loss of the interest-free loan had been improperly submitted to the jury, and that the testimony concerning the pre-demolition market value of the house could not support a verdict in excess of $17,000.00. CUNNINGHAM thereafter met with her counsel who recommended that she file an appeal. Counsel advised her that the District Court had erred in excluding both compensatory and punitive damages from the jury's consideration, as well as in reducing the verdict. However, since CUNNINGHAM wanted some money as soon as possible, she chose not to appeal, despite the advice of counsel.

E. The Fee Proceedings.

Following the trial, counsel for CUNNINGHAM (NERNBERG & LAFFEY), filed a Motion for Counsel Fees on her behalf pursuant to 42 U.S.C. §1988. In support of the Motion, NERNBERG & LAFFEY also filed an extensive Affidavit, which was based upon actual time records, detailing the items of work performed and the time spent for each. Petitioners did not file an Affidavit in opposition to the Motion for Counsel Fees, nor did they seek an opportunity to examine the members of NERNBERG & LAFFEY on the accuracy of the Affidavit. Instead, Petitioners merely filed a brief asserting that CUNNINGHAM was entitled to no fees since she had entered into a contingent fee arrangement, or in the alternative, since her case did not advance the civil rights of the public at large. Although the Affidavit in Support of the Motion for Counsel Fees was uncontradicted, and no hearing was requested with respect to the same, the District Court reduced the hours for which compensation was awarded by approximately one-third (⅓), cut the

hourly rate requested in half, from $100.00 per hour to $50.00 per hour, and finally reduced the resulting lodestar amount by fifty percent (50%) since "the decision affected only an individual plaintiff."

CUNNINGHAM appealed the District Court's Order regarding Counsel Fees to the United States Court of Appeals for the Third Circuit. Following the submission of briefs and oral argument before a panel of the Third Circuit, the panel found that Petitioners had waived their right to question CUNNINGHAM's fee request by their failure to properly challenge the request in the District Court. Accordingly, the Third Circuit issued an Opinion and Order reversing the judgment of the District Court and remanding the case for entry of judgment for the lodestar amount requested. Petitioners then filed their initial Petition for Writ of Certiorari before this Honorable Court. By Order dated July 7, 1986, this Court vacated the judgment of the Third Circuit and remanded the case for further consideration in light of *City of Riverside v. Rivera*, 477 U.S. ____ (1986). Upon remand, the Third Circuit considered the Opinion in *City of Riverside* and concluded that it did "not undermine our original panel opinion" (Appendix, 2a). Accordingly, the Third Circuit entered an Order reinstating its original judgment. Petitioners have now filed a second Petition for Writ of Certiorari before this Honorable Court.

SUMMARY OF ARGUMENT

The law is clear that the number of hours reasonably expended upon a case as well as the reasonableness of the hourly rate requested in a Petition for Attorneys' Fees are questions of fact. Since Petitioners failed to submit any evidence to the District Court to challenge the accuracy and reasonableness of the hours charged and hourly rate requested by Respondent, no factual issues were raised and thus Petitioners have waived these arguments.

The Petitioners' remaining arguments are not supported by the record and are frivolous in view of their failure to make an offer of judgment prior to trial. In fact, a review of the record

indicates that Petitioners' own dilatory tactics prolonged the litigation and caused the fees to be increased in this case.

ARGUMENT

I. PETITIONERS' FAILURE TO CHALLENGE THE REASONABLENESS OF THE HOURS EXPENDED AND HOURLY RATE REQUESTED IN THE DISTRICT COURT CONSTITUTED A WAIVER OF THESE ISSUES.

As previously set forth, Petitioners failed to file an Affidavit in Opposition to Respondent's Motion for Counsel Fees, nor did they request a hearing to challenge the accuracy of Respondent's Affidavit setting forth the hours expended, the necessity for their expenditure and the hourly rate requested. Since Petitioners failed to submit any evidence to challenge Respondent's fee request, the Third Circuit properly held that Petitioners had waived these issues.

A case directly on point is this Court's decision in *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). In *Blum*, the Petitioner was contesting a fee award made pursuant to 42 U.S.C. §1988 to a legal aid society. Although the main thrust of Petitioner's argument was that fee awards to legal aid societies should be based upon cost rather than on prevailing market rates, Petitioner also argued that the number of hours requested by the Respondent's counsel were unreasonable. However, since the Petitioner failed to submit evidence in the District Court to support his claim that the hours charged were unreasonable, this Honorable Court refused to consider the issue. As set forth in the Opinion of Justice Powell:

> We decline to consider the petitioner's further argument that the hours charged by respondents' counsel were unreasonable. As noted above, petitioner failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged, see *Hensley*, supra. ____ U.S., at ____, 103 S.Ct. at 1039, or the facts asserted in the affidavits submitted by respondents' counsel.

> It therefore waived its right to an evidentiary hearing in the District Court. See *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 472-473 (CA2 1974) (where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award). In view of the trial strategy it choose, petitioner waived its right to challenge in this Court the District Court's determination that the number of hours billed were reasonable for cases of similar complexity.

104 S.Ct. at 1554.

In its Opinion Sur Remand From United States Supreme Court, the Third Circuit made it eminently clear that it was rejecting Petitioners' belated challenges to the fee request on the basis of the principles set forth in *Blum v. Stenson*, supra.:

> We considered it inappropriate for a district court in an adversarial system to reject uncontradicted sworn affidavits because of reasons not raised by opposing counsel and on the basis of facts 'of which the trial court has no personal knowledge.' 753 F.2d at 267. Thus, the essence of our decision reversing the district court's calculation of the lodestar figure was procedural. Nothing in the plurality opinion in City of Riverside would appear to affect this reasoning. . . (Appendix, 7a-8a).
>
> . . .We did not base that reversal on a rejection of a proportionality principle, only on the failure of defendants to challenge the reasonableness of the lodestar fee request with argument or evidence (Appendix, 8a).
>
> . . .Under present standards, however, defendants did not properly challenge the reasonableness of the fee request. Neither the record nor the district court's findings were adequate to justify the drastic reduction of the plaintiff's uncontradicted claims under our present standards. Nothing in City of Riverside that we can identify or that the defendants have pointed out affects that result. . . (Appendix, 10a).

Thus, since the Third Circuit's decision on remand was in full accordance with the principles enunciated by this Honorable Court in *Blum*, it must be upheld.

II. PETITIONERS' REMAINING ARGUMENTS ARE NOT SUPPORTED BY THE RECORD AND ARE FRIVOLOUS IN VIEW OF THEIR FAILURE TO MAKE AN OFFER OF JUDGMENT PRIOR TO TRIAL.

Petitioners urgently insist that the fee award in the present case is not compensatory but punitive, and that a gross injustice will occur if the holding of the Third Circuit is permitted to stand. Thus, Petitioners assert that CUNNINGHAM's prosecution of the case was unreasonable since she demanded damages that were greatly in excess of the $17,000.00 ultimately awarded. However, as indicated in the Counterstatement of the Case, supra., this argument simply is not supported by the record in this case. Thus, the jury awarded CUNNINGHAM $35,000.00, and was not even permitted to consider a number of damage items which were supported by the evidence, including punitive damages. Although the District Court ultimately reduced the award to $17,000.00, counsel for CUNNINGHAM at all times advised her that the reduction was improper and should have been appealed. Due to the lack of such an appeal, the true value of CUNNINGHAM's claim has never been established. Thus, the Petitioners' bald assertion that CUNNINGHAM's claim was worth only $17,000.00 constitutes nothing more than a logical fallacy. In fact, in its Opinion reversing the District Court's fee award, the Third Circuit agreed that "the verdict would support a judgment in CUNNINGHAM's favor for $35,000.00."

Petitioners also blatantly characterize CUNNINGHAM's case as "a simple tort claim" (Petition, p. 11), despite the record evidence and Petitioners' own acts to the contrary. If the case was as "simple" as Petitioners contend, why didn't they acknowledge liability and allow the case to be tried solely on the issue of damages? Such a procedure would have saved substantial time and effort both during trial and in preparation for the same. Instead, as previously set forth, Petitioners hotly contested their

liability to the very end of the trial. If the case was really so "simple", then Petitioners and their counsel should be sanctioned under Fed.R.Civ.P. 11 for contesting their liability. Moreover, the District Court obviously did not view the damage issues as simple, as it initially allowed the jury to award damages for CUNNINGHAM's loss of the interest-free loan, and failed to withdraw this issue from the jury's consideration until after the verdict had been rendered.

Petitioners also assert that CUNNINGHAM unreasonably refused their settlement offer of $15,000.00, thus causing the fee request to be inflated. However, such statement is patently untrue in that Petitioners did not even make an offer of settlement until the day before trial, when most of the work on behalf of CUNNINGHAM had already been done. Moreover, Petitioners' settlement offer was itself unreasonable in light of the actual damages sustained by CUNNINGHAM, and the fact that the offer was conditioned upon a waiver of the right to request attorneys' fees. Finally, this argument should be precluded due to Petitioners' failure to make an offer of judgment prior to trial.

Fed.R.Civ.P. 68 provides in relevant part that:

> At any time more than 10 days before trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property to the effect specified in his offer, with costs then accrued. . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Petitioners assert that since CUNNINGHAM rejected their settlement offer, she should receive no recovery for fees incurred after such rejection. However, since Petitioners failed to make an offer of judgment under Rule 68, they should be precluded from seeking the benefits under the Rule. Moreover, even if the Petitioners' settlement offer had been made as a Rule 68 Offer of Judgment, the offer itself would have been defective since it failed to contain a provision for attorneys' fees as part of the "costs then accrued."

A case directly on point is this Court's recent decision in *Marek v. Chesney*, 473 U.S. ____, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). In *Marek*, petitioners, defendants in a civil rights action, made a timely pretrial offer of judgment pursuant to Rule 68, which offer expressly included attorneys' fees. The offer was rejected and the case proceeded to trial, resulting in an award which was less than the Rule 68 offer of judgment. Plaintiffs thereafter moved for attorneys' fees pursuant to 42 U.S.C. §1988, which were denied by the District Court in reliance on Rule 68. On certiorari, this Court examined both the history and purpose of the Civil Rights Attorney's Fees Awards Act, and held that attorney's fees awarded pursuant to the Act were in fact subject to the cost-shifting provision in Rule 68. As set forth in the Opinion of Chief Justice Burger:

> Here, respondents sued under 42 U.S.C. §1983. Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C §1988, a prevailing party in a §1983 action may be awarded attorney's fees 'as part of the costs.' Since Congress expressly included attorney's fees as 'costs' available to a plaintiff in a §1983 suit, such fees are subject to the cost-shifting provison of Rule 68.

105 S.Ct. at 3017. More important to the present case, this Court specifically held that a valid offer under Rule 68 may *not* exclude liability for costs, including attorneys' fees, which have already accrued:

> In either case, however, the offer has allowed judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs. Accordingly, it is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or for that matter, whether it refers to costs at all. As long as the offer does not implicity or explicity provide that the judgment not include costs, a timely offer will be valid.

105 S.Ct. at 3016. In the present case, as previously set forth, Petitioners' offer was conditioned upon the waiver of the right to recover attorneys' fees, and thus was invalid under Rule 68.

Moreover, even if the $15,000.00 offer was construed to include attorneys' fees already accrued to date, it would be patently unreasonable since CUNNINGHAM's attorneys had already pursued the case for almost two years at the time the offer was made. Thus, since Petitioners failed to comply with Rule 68, their arguments are frivolous.

Finally, Petitioners contend that the within case presents "an example of the judicial process run amok" (Petition, p.5). However, a review of the record clearly indicates that it is not the judicial process but the Petitioners who have "run amok," prolonging the litigation and increasing the fees in this case. Petitioners contested their liability causing substantial pretrial preparation and a four day trial, although they now assert that the case was "simple." Petitioners failed to make a settlement offer until the eve of trial, and even when made, the "offer" was woefully inadequate and failed to provide for fees for time already spent. Petitioners failed to properly challenge Respondent's fee request in the District Court. Seeking to remedy their failure, Petitioners have filed successive Petitions for Writ of Certiorari with this Honorable Court. Yet Petitioners now have the nerve to complain about Respondent's request for additional fees for time spent on appeal, when such additional time was incurred only due to Petitioners' own spurious and dilatory tactics. Such tactics should not be countenanced by this Honorable Court, and accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

In conclusion, it is respectfully requested that this Honorable Court dismiss the Petition for Writ of Certiorari and remand the case to the District Court for the entry of judgment in accordance with the Opinion and Order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Maurice A. Nernberg, Jr., Esquire
James R. Cooney, Esquire
NERNBERG & LAFFEY, P.C.
301 Smithfield Street
Pittsburgh, PA 15222-2277
(412) 232-0334

Attorneys for Respondent

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-3209

REBECCA L. CUNNINGHAM,
an individual,

Appellant

v.

THE CITY OF MCKEESPORT,
WILLIAM WEISSERT, SAMUEL R. VIDNOVIC,
GERALD F. BOYLE, JOSEPH P. GRAZIANO, JAMES
HEATHERINGTON, CHARLES A. SHARBAUGH,
NICHOLAS J. SKEZAS, CAROLYN O. YOUNG, and
OMSLAER WRECKING CO., ROBERT CLYDE
OMSLAER, t/d/b/a OMSLAER WRECKING COMPANY

Appellees

On Appeal from the United States
District Court for the
Western District of Pennsylvania
(D.C. Civil No. 81-1434)

Submitted Under Rule 12(6)
August 18, 1986

Before: GIBBONS, BECKER, *Circuit Judges*
and KATZ,* *District Judge*

(Filed DECEMBER 12, 1986)

DEBORAH D. OLSZEWSKI
Trushel, Wood & Israel
1207 Fifth Avenue
Pittsburgh, PA 15219
Attorney for Appellee

---

*Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JAMES R. COONEY
Nernberg & Laffey
301 Smithfield Street
Pittsburgh, PA 15222-2277

Attorney for Appellant

OPINION SUR REMAND FROM
UNITED STATES SUPREME COURT

BECKER, *Circuit Judge*.

The Supreme Court has remanded this case to us for further consideration in light of its opinion in *City of Riverside v. Rivera*, 106 S.Ct. 2686 (1986). This opinion reflects that further consideration. For the reasons that follow, we believe that the Supreme Court's plurality opinion does not undermine our original panel opinion, which is reported at 753 F.2d 262 (3d Cir. 1985). Therefore we will reinstate our previous order reversing the judgment of the district court and will remand the case for further proceedings consistent with the panel opinion.

I.

This is a civil rights case brought under 42 U.S.C. § 1983, in which the plaintiff sought recovery against the City of McKeesport and a number of its officials after a house and garage that she owned were demolished by the city without prior notice. The defendants contested both liability and damages. After extensive discovery and a three-day jury trial, the plaintiff won a verdict of $35,000, which the district court reduced to $17,000. Plaintiff thereupon sought a counsel fee award in the sum of $35,887.50, on the claim that her counsel had devoted 358 hours in connection with the case, including 247.75 hours in pretrial discovery. She asserted that the services rendered were worth $100 to $125 per hour depending on the particular attorney who performed the services. The district court disallowed all but 219

hours, and valued the services at $50 per hour. This resulted in a lodestar of $10,950. The court then applied a 50% negative multiplier to the lodestar and approved an additional $400 in attorney's fees for prosecution of the fee petition, arriving at a total award of $5,875.

Holding that these reductions were improper, this panel reversed and remanded for recalculation of the fee in accordance with the panel's decision, *see* 753 F.2d 262 (3d Cir. 1985). We reasoned first that the court had no basis for reducing the rate or disallowing those hours of which the court had no personal knowledge. The claimed hours and billing were uncontradicted in the record and defendants had not challenged their reasonableness. We also held that the negative multiplier was improper because the grounds assigned by the district court for applying the negative multiplier were not cognizable in law, *see infra* at p. 10-11. Significantly, the defendants did not assert either before the district court or before this court the contention that the claimed counsel fee was disproportionate to the damages. However, several members of this court expressed concern over the disproportion between the damage award and the fee that would result from the panel's decision. *See* Statement by Circuit Judge Adams Sur Denial of Petition for Rehearing, 753 F.2d at 269.

The defendants petitioned the Supreme Court for a writ of certiorari. Notwithstanding the clearly articulated concern about proportionality in Judge Adams' statement, the defendants petition for certiorari did not articulate a proportionality claim.[1]

---

1. Defendants raised two questions in their Petition for Writ of Certiorari:

I. Whether the decision of the United States Court of Appeals for the Third Circuit in applying the standards of *Lindy Brothers, Inc., v. American Radiator and Standard Sanitary Corporation*, 540 F.2d 102 (3d Cir. 1976), thereby dictating the amount of attorney's fees is so far a departure from the body of federal law governing the award of attorney's fees in Civil Rights cases and so repugnant to the intention and spirit of the Civil Rights Act as a whole, as to warrant this Court's power of Supervision?

II. Whether the decision of the United States Court of Appeals for the Third Circuit is in conflict with another decision of the Third Circuit setting forth the standard of review and, in fact, ignored that standard? *Silberman v. Bogle*, 683 F.Supp. 62 (3rd Cir. 1982).

Nonetheless, the Supreme Court plainly understood proportionality to be the central question posed by the petition, *see City of Riverside v. Rivera*, 106 S. Ct. 5, 7 (1985) (opinion of Rehnquist, J., sur grant for a stay of Court of Appeals mandate) (identifying proportionality as an issue in *City of McKeesport* and concluding "that it is likely that certiorari will be granted in either this case or *City of McKeesport*, or both."). Faithful to Justice Rehnquist's prediction, the Supreme Court did grant certiorari on this issue — in the *City of Riverside* case.

In *City of Riverside*, eight Chicano persons filed a civil rights action against the city and 30 of its individual police officers who had broken up a party and arrested and imprisoned them. The plaintiffs, alleging that the conduct of defendants displayed a discriminatory animus, asserted violations of the plaintiff's first, fourth and fourteenth Amendment rights. The district court granted summary judgment in favor of 17 of the individual police officers, and the case proceeded to trial against the remaining defendants. The jury returned a verdict against the city and five individual officers, awarding plaintiffs damages in the amount of $33,350.

Plaintiffs thereafter sought attorney's fees pursuant to the Civil Rights Attorney Fees Award Act, 42 U.S.C. § 1988, in the amount of $245,456.25, for 1,946.75 hours at the rate of $125. The district court granted fees in the lodestar amount requested, and the Court of Appeals for the Ninth Circuit affirmed. 679 F.2d 795 (9th Cir. 1982). The Supreme Court, 461 U.S. 452, granted certiorari, vacated the judgment, and remanded the case for reconsideration in light of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Following remand, the district court reaffirmed its award in the amount of the requested lodestar, and again the Ninth Circuit affirmed. 763 F.2d 1580 (9th Cir. 1985). Defendants again sought certiorari and the Supreme Court granted the writ to determine the sole issue of whether "the district court's fee award was not 'reasonable' within the meaning of § 1988, because it was disproportionate to the amount of damages recovered by respondents", 106 S. Ct. 144 (1985).

In his opinion announcing the judgment of the court, Justice Brennan considered both the legislative history as well as the

purposes for the enactment of 42 U.S.C. § 1988, and determined that proportionality was not a requirement:

> A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with the Congress' purpose of enacting § 1988. Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.

106 S.Ct. 2685, 2696 (1986).

Justice Powell concurred in the judgment, although he displayed obvious discomfort with the result. *See* 106 S.Ct. at 2698 (Powell, Jr., concurring in the judgment) ("on its face, the fee award seems unreasonable"). He joined in the judgment because he was satisfied that affirmance was required by the district court's detailed findings of fact, which had been approved by the Court of Appeals. *Id.* at 2699, Justice Powell addressed the question of proportionality in a paragraph of text augmented by a pregnant footnote:

> Petitioners argue for a rule of proportionality between the fee awarded and the damages recovered in a civil rights case. Neither the decision of this Court nor the legislative history of § 1988 support such a "rule." The facts and circumstances of litigation are infinitely variable. Under *Hensley*, of course, "the most critical factor [in the final determination of fee awards] is the degree of success obtained." 461 U.S., at 436, 103 S. Ct. at 1941. Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought. In some civil rights cases,

however, the court may consider the vindication of constitutional rights in addition to the amount of damages recovered. In this case, for example, the district court made an explicit finding that the "public interest" had been served by the jury's verdict that the warrantless entry was lawless and unconstitutional. Although the finding of a Fourth Amendment violation hardly can be considered a new constitutional ruling, in the special circumstances of this case, the vindication of the asserted Fourth Amendment right may well have served a public interest, supporting the amount of the fees awarded.* As the district court put it, there were allegations that the police misconduct was "motivated by a general hostility to the Chicano community in the area. . . ." Appl. to Pet. for cert. 2-8. The record also contained evidence of racial slurs by some of the police.

---

* It probably will be the rare case in which an award of private damages can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case.

Id. at 2700 & n.3.

Justice Rehnquist, joined by the remaining justices, dissented. Using as his starting point the precept of *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), that "[t]he district court . . . should exclude from the initial fee calculation hours that were not 'reasonably expended' " on the litigation, Justice Rehnquist would have held that the District Court's finding that respondents' attorneys "reasonably" spent 1,946.75 hours to recover a money judgment of $33,350 was clearly erroneous. While not drawing the contours of a proportionality requirement, the dissent made clear that the plaintiff had to demonstrate a reasonable relationship between the amount of the recovery and the amount of the fee.

III.

The principal question before us, of course, is what to make of *City of Riverside*, or more precisely, of the Supreme Court's vacatur of our judgment and remand for reconsideration in light of that opinion.

A.

In terms of what appears to be the preeminent question — that of proportionality — the Supreme Court plurality rejected a proportionality rule. Therefore, under the plurality approach, even if we deem the defendants to have raised proportionality as an issue, it cannot help them. Indeed, we find nothing in the plurality opinion that affects our previous decision. The unifying theme of the plurality opinion is the plurality's satisfaction that the findings of the district court were sufficiently detailed to justify the fee award. We, however, face the obverse situation. In this case, the findings of the district court purporting to justify a reduction in the fee request are not specific and lack the evidentiary basis to counter the uncontradicted affidavit of plaintiff's counsel detailing the hours expended and billing rate.

The district court reduced the lodestar request by disallowing hours and by reducing the billing rate. As we stressed in our earlier opinion, the court had no facts before it to justify such a reduction. In the absence of any factual claims by defendants, the only reduction the court could properly order concerned hours about which the district judge had personal knowledge, namely, hours claimed for work at pretrial conferences and at trial. Moreover, defendants did not even challenge the reasonableness of the hours or the hourly rate, but rely on legal arguments properly rejected by the district court and by us, that no fee should be awarded at all. *See* 753 F.2d at 265-66, 68. We considered it inappropriate for a district court in an adversarial system to reject uncontradicted sworn affidavits because of reasons not raised by opposing counsel and on the basis of facts "of which the trial court has no personal knowledge." 753 F.2d at 267. Thus, the essence of our decision reversing the district court's calculation of the lodestar figure was procedural. Nothing

in the plurality opinion in *City of Riverside* would appear to affect this reasoning, and defendants' submissions on remand have furnished us with no reason or authority demonstrating that our earlier opinion was incorrect.

B.

We have considered the possibility that, given the 4-1-4 vote of the Supreme Court, we are charged with applying the thrust of Justice Powell's somewhat enigmatic footnote, quoted *supra* at 7. That aproach arguably counsels a judge to consider the extent to which the public interest was vindicated by the award if the fee sought is disproportionate to the damages awarded. As an initial matter, we do not believe even this arguable interpretation is relevant to our reversal of the district court's lodestar calculation. We did not base that reversal on a rejection of a proportionality principle, only on the failure of defendants to challenge the reasonableness of the lodestar fee request with arguments or evidence.

Conceivably, Justice Powell's footnote could be relevant if the vacatur of our earlier decision was directed not at our reversal of the lodestar determination but rather at our rejection of the district court's negative multiplier. The district court applied a negative multiplier based upon the following reasoning:

> The *Lindy* [lodestar] amount as calculated above will be subject to a post-*Lindy* discretionary adjustment. Plaintiff's counsel did not successfully advance new law which might serve the public interest in the future. The decision affected only an individual plaintiff who was subject to an isolated act of deprivation for which she was adequately compensated. There was no indication of bad faith in defense of the action. In light of these considerations, a reduction of the *Lindy* amount by 50% to $5,475 is fair and equitable in this case.

App. 80a (citations omitted). We reversed because we observed that many constitutional rights are singular in the nature and that no case had ever suggested that such a fact could justify a negative mulitplier. We also noted that bad faith in defense of an

action was irrelevant to a negative multiplier. Finally, we emphasized that multipliers were not subject to a district court's general discretion but were justifiable only on particular grounds based on specific findings supportable in the record. 753 F.2d at 268-69.

We recognize that Justice Powell's decision does suggest a difference between cases in which "recovery of private damages is the purpose" and other cases for which "the court may consider the vindication of constitutional rights in addition to the amount of damages recovered," 106 S. Ct. at 2700. In Justice Powell's view, this distinction is relevant for evaluating the extent to which a jury's verdict serves the "public interest." *Id.* Combined with the statement in the footnote that only in the rare case might the public interest justify a substantial disproportionality between damages and fees. Justice Powell's opinion might be read to suggest that disproportionality justifies a negative multiplier.

We refrain from inferring such a view from *City of Riverside*, however. First, this interpretation represents at most the view of a lone Justice and was not endorsed by any of the other eight.[2] It may not even adequately characterize Justice Powell's views, for his opinion also states that "[n]either the decisions of this Court nor the legislative history of § 1988 support" a proportionality rule. 106 S. Ct. at 2700. Second, we have doubts about Justice Powell's statement that only the rare case justifies disproportionate fee awards. The facts of *City of Riverside* seem similar to those of a number of §1983 cases that we have seen. If

2. We have considered whether Justice Powell has simply endorsed a more limited view of proportionality than the dissent, so that we may infer the support of the four dissenters for Justice Powell's approach. However, in contrast to Justice Powell's focus on the public interest, the dissent's exceptions to a strict, albeit undefined, proportionality rule would focus on specific, "identifiable benefits" to non-plaintiffs or specific other factors that explain a particularly high fee relative to the damage award or a particularly low damage award relative to a fee. Nothing in the dissent suggests sympathy for the view that some suits advance the public interest more than others because of factors distinct from the relief obtained. We are, accordingly, unwilling to ascribe Justice Powell's view to the dissenters merely on the grounds of their support for proportionality.

the facts of *City of Riverside* justify a "disproportionate" fee award, the facts in many if not most § 1983 cases should do so as well. Finally, we consider application of Justice Powell's reasoning problematic. The opinion sets out no method or standards by which a court might calculate the public interest served by a case, evaluate that interest in light of a disproportionality between damages and fees, and eventually settle upon a particular negative multiplier. In the absence of an explicit mandate, we are reluctant to begin the difficult task of developing standards by which we might incorporate proportionality principles into the attorney's fee calculus.

Even assuming that we have accurately characterized Justice Powell's views and should apply them to this case, we do not believe they dictate a different result here. As in our reasoning about the lodestar, we reversed the district court's negative multiplier in part because the court's findings were not specific and were not grounded in the record. Indeed, defendants did not even raise a claim that might justify a negative multiplier under the views we attribute to Justice Powell. Defendants did claim that because Cunningham sought recovery for herself alone, she was not vindicating interests of the public at large and so should not recover *any* fee. However, by whatever standards we evaluate the public interest served by a suit for private damages, the mere fact that a constitutional right is singular in nature cannot be determinative. In sum, the rationale for our ruling is untouched even by a broad reading of Justice Powell's concurrence.

IV.

It may be that in cases to come the Supreme Court will refine or alter the standards for calculating counsel fees, or perhaps Congress will do so. Under present standards, however, defendants did not properly challenge the reasonableness of the fee request. Neither the record nor the district court's findings were adequate to justify the drastic reduction of plaintiff's uncontradicted claims under our present standards. Nothing in *City of Riverside* that we can identify or that the defendants have pointed out affects that result. Accordingly, the judgment of the

district court will be reversed and the case remanded for further proceedings consistent with our original panel opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit